No. 79839-7

SANDERS, J. (dissenting)—In 1985 the legislature adopted the clean indoor air act, which limited smoking in some but not all public places. Laws of 1985, ch. 236. American Legion Post #149 (the Post Home), a private member-run organization whose membership is limited to those who served in the military or Merchant Marines during a time of armed conflict, was clearly exempt. However in 2006, Initiative 901, the smoking in public places act (the Act), amended the clean indoor air act, extending the smoking ban to places of employment. The question is whether the Act prohibits smoking at the Post Home and, if so, is the Act constitutional. The majority answers both questions in the affirmative. I disagree.

The first question is one of statutory interpretation wherein our inquiry is to ascertain the voters' intent based on the language of the initiative as an average informed layperson would read it. *In re Estate of Hitchman*, 100 Wn.2d 464, 467, 670 P.2d 655 (1983) (citing *Dep't of Revenue v. Hoppe,* 82 Wn.2d 549, 555, 512 P.2d 1094 (1973)). The second question is purely one of law wherein our inquiry is whether the Act violates the constitution. Such a question of law is properly reviewed de novo. *See, e.g., In re Parentage of*

C.A.M.A., 154 Wn.2d 52, 57, 109 P.3d 405 (2005) ("The interpretation of a statute and the determination of whether a statute violates the United States Constitution are issues of law that are reviewed *de novo*.") (citing *Cockle v. Dep't of Labor & Indus.,* 142 Wn.2d 801, 807, 16 P.3d 583 (2001)*; State v. Blilie,* 132 Wn.2d 484, 489, 939 P.2d 691 (1997)).[1]

To Avoid Constitutional Infirmity the Act Exempts the Post Home

"[W]here a statute is susceptible of several interpretations, some of which may render it unconstitutional, the court, without doing violence to the legislative purpose, will adopt a construction which will sustain its constitutionality if at all possible to do so." *State ex rel. Morgan v. Kinnear*, 80

[1] The State argues the Act is presumed constitutional and such presumption may be overcome only by proof beyond a reasonable doubt. Such a presumption has no place in our constitutional system. *Island County v. State*, 135 Wn.2d 141, 155-70, 955 P.2d 377 (1998) (Sanders, J., concurring). Moreover, if any presumption exists it is a "[p]resumption of [l]iberty" wherein the State must prove "the necessity and propriety of its restrictions on liberty." Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 273 (2004); *see also Andersen v. King County*, 158 Wn.2d 1, 52, 138 P.3d 963 (2006) ("[T]he State has met its burden in demonstrating that DOMA [Washington's 1998 Defense of Marriage Act] meets the minimum scrutiny required by the constitution."); Richard A. Epstein, *Preface* to Robert A. Levy & William Mellor, THE DIRTY DOZEN: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom xviii (2008) ("A free society requires judges to enforce, and political actors to respect, the principles of limited government. That vital objective can only be achieved if courts understand that government regulation should be examined, in most constitutional contexts, under a presumption that the regulation is impermissible.").

Wn.2d 400, 402, 494 P.2d 1362 (1972).

The Act prohibits smoking "in a public place or in any place of employment." RCW 70.160.030. However, the Act "is not intended to restrict smoking in private facilities . . . ." RCW 70.160.020(2). Moreover, the Act permits "smoking in a private enclosed workplace, within a public place, even though such workplace may be visited by nonsmokers . . . ." RCW 70.160.060. To read this language as a layperson would read it, the Act exempts the Post Home.

The majority perceives exempting the Post Home is inconsistent with the statutory scheme and the intent of the voters. I disagree. To interpret the statute any other way is not only to ignore the text and intent of the voters but also to invite constitutional error.

"'In construing the meaning of an initiative, the language of the enactment is to be read as the average informed lay voter would read it.'" Majority at 6 (internal quotation marks omitted) (quoting *State v. Brown,* 139 Wn.2d 20, 28, 983 P.2d 608 (1999)). The Act does not define "private facility" or "private enclosed workplace." However, "private" means "intended for or restricted to the use of a particular person *or group or class of persons* **:** not freely available to the public."[2] A "facility" is "something . . . that is built,

[2] Webster's Third New International Dictionary 1804 (2002) (emphasis added).

constructed, installed, or *established to perform some particular function or to serve some particular end*."[3] A "workplace" is "a place . . . where work is done."[4]

The Post Home is clearly "private." Its membership is restricted to those persons who have served this country at a time of armed conflict, and its employees are "directly related to either current members . . . or deceased veterans who, if they were alive, would be entitled to membership." Majority at 3 n.2. Moreover, the Post Home is a "facility" established for the particular function of facilitating the gathering of those persons who have served this country in a time of war. The exception of RCW 70.160.020(2) applies to the Post Home.

The majority reasons that applying the exception to the Post Home would swallow the smoking restriction at places of employment, analogizing to an office building with hundreds of employees. Majority at 12-13; *see also* concurrence at 1. But its analogy is inapt; an office building is not restricted to a particular group or class of persons.[5] Post Home, however, as a private association may be and in fact is restrictive in its membership and employment.

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[3] Webster's, *supra*, at 812-13 (emphasis added).

[4] Webster's, *supra*, at 2635 (emphasis added).

[5] *See, e.g.,* ch. 49.60 RCW (Washington's Law Against Discrimination).

See Boy Scouts of Am. v. Dale, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000); *see also* RCW 49.60.040(3) (excluding "any religious or sectarian organization not organized for private profit" from discrimination laws).

Nor can it be said the "private facility" exemption frustrates the voters' intention. Initiative 901 amended RCW 70.160.020(2) to include certain places of employment with the "public place" definition while leaving intact the "private facility" exception. *See* RCW 70.160.020(2) (banning smoking from "bars, taverns, bowling alleys, skating rinks, casinos[;] . . . [t]his chapter is not intended to restrict smoking in private facilities"). When enlarging the smoking ban to include these places of employment, the voters left intact this very specific "private facility" exemption. Moreover, the voters left intact the exemption for smoking in "private enclosed workplaces, within a public place. . . ." RCW 70.160.060.

These exceptions to the smoking ban express the voters' recognition that certain private places, even if places of employment, are exempt from the smoking ban. We must recognize these specific exemptions, not replace them with our own.[6] *See In re Estate of Little*, 106 Wn.2d 269, 283, 721 P.2d 950 (1986) (giving effect to specific statute over general one).

Nor do these specific exemptions conflict with the voters' intent to protect employees from secondhand smoke for two reasons. First, the stated

intention of Initiative 901 was "to prohibit smoking in public places *and* workplaces." RCW 70.160.011 (emphasis added). In this context the word "and" is conjunctive, joining the two elements "so that the second logically qualifies the first . . . ." Webster's Third New International Dictionary 80 (2002). In other words, the voters' intention was to restrict smoking from places of employment that were also public places.

Second, a "private facility" and "private enclosed workplace" are, by definition, limited to particular places available to a particular class of people, the class of people who make it private. Employment at a "private facility," available only to members of the organization, is not employment in the usual sense of the term; employment is restricted to members of the particular class to make the "private facility" private in the first place.[7] At the Post Home a person is a member first, an employee second. If a private member-run association may restrict employment to only its voluntary members, it is a "private facility" and exempt from the smoking ban. This is a much narrower

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[6] Under the majority's reasoning, smoking is permitted in the enclosed manager's office at a retail store in the local mall, "even though such workplace may be visited by nonsmokers." RCW 70.160.060. But it is absurd to reason the voters intended smoking to occur at a public place of employment but not at a private one, which is equally a place of employment, when the Act expressly excludes both.

[7] *See* RCW 49.60.040(3) (excluding "any religious or sectarian organization not organized for private profit" from employment discrimination laws).

exception than the one conceived by the majority and concurrence.

All seven employees of the Post Home are members of its auxiliary. "Membership in the Auxiliary is limited to women who are directly related to either current members of the American Legion or deceased veterans who, if they were alive, would be entitled to membership." Majority at 3 n.2. All seven Post Home employees are directly related to other members of the Post Home. It is ironic a member may smoke with his wife at home but not at the Post Home because at the Post Home his wife is being remunerated for her time. It is equally ironic that six out of seven of the auxiliary members employed at the Post Home are themselves smokers.[8]

The "private facility" exception reflects the greater importance of private autonomy over business relationships. Otherwise, what public purpose does the Act serve beyond pernicious interference with personal liberty?

According to the majority, to permit smoking at the Post Home would "involuntarily subject[]" employees to the supposed dangers of workplace smoke. Majority at 13. Our majority forgets we purport to live in a free society; this is neither the "Soviet of Washington"[9] nor Nazi Germany.

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[8] The single nonsmoker auxiliary member who is also an employee would prefer smoking to continue at the Post Home. Clerk's Papers at 106.

[9] "'To the 47 States of the Union and the Soviet of Washington'" is a toast attributed to James "'Big Jim'" Farley, U.S. Postmaster and national Democratic Party leader, in the mid-1930s. Walt Crowley, "Washington State

[10] Slavery was abolished in 1865.[11] Moreover, since Washington is an "at will" employment state, either the employer or the employee can end the employment relationship at any time, with or without notice and with or without cause. *See, e.g., Lasser v. Grunbaum Bros. Furniture Co.,* 46 Wn.2d 408, 410, 281 P.2d 832 (1955). Since none of the Post Home's employees are involuntary, none of them are "involuntarily subjected" to anything. Majority at 13.

The Act Is Void for Vagueness

A vague statute violates the "basic principle of due process" contained in the Fourteenth Amendment to the United States Constitution[12] if it fails to (1) provide fair notice of the proscribed conduct or (2) provide clear standards. *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972).

Politics—Its Past, Present, and Utterly Unpredictable Future," address to the Western Caucus of the Democratic National Central Committee in Seattle, Washington (May 24, 2002), *transcript available at* http://www.historylink.org/essays/output.cfm?file_id=5451.

[10] The aggressive antismoking campaign of National Socialist Germany is well documented. *Aviation W. Corp. v. Dep't of Labor & Indus.,* 138 Wn.2d 413, 457 n.19, 980 P.2d 701 (1999) (Sanders, J., dissenting).

[11] U.S. Const. amend. XIII, § 1 ("Neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction.").

[12]"[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Id. at 108-09 (footnotes omitted); *see also State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001).

The Post Home contends the Act violates the first aspect of the vagueness test. It argues the Act's definition of "place of employment" is vague as to what "private facilities" are exempt.

The majority asserts the statute is not vague because no "private facility" is exempt from the prohibition on smoking in places of employment. That is simply not true. Smoking is permitted in "a private enclosed workplace, within a public place, even though such workplace may be visited by nonsmokers . . . ." RCW 70.160.060. As the trial judge noted, "I'm not sure what that means, because in my interpretation of what's been done here, if that so-called private workplace had employees, then this law covers them. So how do you have a private workplace without employees?" Report of Proceedings at 40. If a learned trial judge is unable to make heads or tails out of the Act, how

is "a person of ordinary intelligence" expected to be able to "steer between lawful and unlawful conduct"? *Grayned*, 408 U.S. at 108.

The majority all but concedes the point, but dodges the issue "because the Post is asserting only an as-applied vagueness challenge." Majority at 43. [13] According to the majority "the interplay between these exceptions ["private facility" and "private workplace within a public place"] and their application in other situations (such as hotel rooms) . . . are not before the court . . . ." *Id*.

I agree with the majority insofar as we are not discussing hotel rooms. However, that does not answer the question of whether a reasonable person would understand the Act prohibits smoking at the Post Home or other private member-run organizations with member-employees. The Act prohibits smoking at places of employment but permits smoking at private facilities and "private enclosed workplace[s], within a public place." RCW 70.160.060.

I agree with the trial judge; I am not sure what this means or how it applies (or perhaps not applies) to the Post Home. As such, the statute is vague.

The Act Violates the Post Home's Right of Intimate Association[14]

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[13] The majority recognizes the vagueness standard is relaxed when the sanction is civil rather than criminal and claims to apply the more rigorous standard. Majority at 41 n.34. However, this clear dodge of the issue calls the majority's assertion into doubt. Every person subject to the prohibition has a due process right to know what conduct is prohibited so that he or she may act accordingly. *Grayned*, 408 U.S. at 108.

[14] For the sake of clarity I avoid the Gordian knot of standing analysis the majority weaves throughout its opinion. The Post Home clearly has standing to

The United States Supreme Court has recognized the fundamental right to enter into and carry on certain intimate associations absent government intrusion. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) observed "two distinct" aspects of the freedom to associate. In the first line of cases, "the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id*. at 618. In the second line of cases, however, "the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme." *Id*. at 617-18. In this second category of decisions, "freedom of association receives protection as a fundamental element of personal liberty" under the due process clause of the Fourteenth Amendment. *Id*. at 618. We find ourselves in this second line.

Every case cited by the majority addressed the issue under the general social associative rights of the First Amendment, not the specific intimate

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enforce its and its members' right of intimate association. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987).

associative rights of the Fourteenth Amendment, a critical distinction. *See* majority at 29-30 (citing *City of Tuscon v. Grezaffi,* 200 Ariz. 130, 136, 23 P.3d 675 (Ct. App. 2001) (dismissing a challenge based on "'generalized right of social association under the First Amendment'" (quoting *Kahn v. Thompson*, 185 Ariz. 408, 414, 916 P.2d 1124 (Ct. App. 1995)); *NYC C.L.A.S.H., Inc. v. City of New York*, 315 F. Supp. 2d 461, 472 (S.D.N.Y. 2004) ("CLASH does not suggest that the gathering of individuals in bars and restaurants to engage in social or even business activities while smoking is the type of 'intimate' relationships that the Supreme Court contemplated in *Roberts* . . . ."); *Taverns for Tots, Inc. v. City of Toledo*, 341 F. Supp. 2d 844, 850-51 (N.D. Ohio 2004) (dismissing the intimate association claim and focusing instead on the First Amendment right of association); *Players, Inc. v. City of New York*, 371 F. Supp. 2d 522, 545 (S.D.N.Y. 2005) (analyzing the claim as one under the First Amendment). Therefore, to the extent these cases discuss or analyze an inapposite right, they are not applicable to the resolution of the issue here.

"Intimate associations" are those that include "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." *Roberts*, 468 U.S. at 620; *see also City of Bremerton v. Widell*, 146 Wn.2d 561, 576-77, 51 P.3d 733 (2002). This

court has "decline[d] to hold that the right of intimate association is limited solely to familial relationships." *Id*. at 577; *see also Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 545-46. "In determining whether a particular association is sufficiently personal or private to warrant constitutional protection, we consider factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." *Id*. at 546 (citing *Roberts,* 468 U.S. at 620).

The question of whether the Post Home is an intimate association cannot be seriously debated. Membership in the Post Home is limited to veterans and Merchant Marines who served this nation during times of armed conflict. For centuries the brotherhood of soldiers has been recognized:

> We few, we happy few, we band of brothers; For he to-day that sheds his blood with me Shall be my brother. Be he ne'er so vile, This day shall gentle his condition; And gentlemen in England now abed Shall think themselves accurs'd they were not here, And hold their manhoods cheap whiles any speaks That fought with us upon Saint Crispin's Day.[15]

This brotherhood is forged in battle, tempered by that common experience, and shaped by the mutual empathy of life afterward. Those who have not experienced armed conflict ought to be the first to recognize the intimacy created by that unique experience, not contest its existence.[16]

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[15] William Shakespeare, The Life of King Henry the Fifth, act 4, sc. 3.

[16] That there are 591 members of the Post Home does not negate the intimacy, but rather comments on this nation's foreign policy over the last 50 or more years. Nor can the intimacy be diminished by the fact of the members not being

Once properly recognized, the question becomes whether the smoking ban represents an "undue intrusion by the State . . . ." *Roberts*, 468 U.S. at 618. In the context of the familial relationship, an "undue intrusion" exists when the State imposes itself into the decision making process of the family, including the decision of whether to become a family. *Id*. at 619-20 (citing cases).

To pick up this analytical cue, the question becomes whether the smoking ban is an imposition into the decision making process of the Post Home or its members, including the decision to enter into or maintain a relationship with the Post Home.

According to the majority, "'it is difficult to see how the social intercourse, and social intimacy, that the club seeks to facilitate could be unconstitutionally infringed merely because the meeting place provided by the club can no longer allow indoor smoking.'" Majority at 30-31 (quoting *Players,* 371 F. Supp. 2d at 545).

Yet if smoking were banned at the Post Home, its members "would feel forced to eliminate or severely curtail their use of . . . the Post Home . . . . If smoking was banned, the Post would lose members who would go elsewhere . . . ." Clerk's Papers (CP) at 105 (Decl. of Robert Kucenski). Even

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deployed together. It is not the common enemy that binds these veterans in brotherhood but the common experience. The bullets may be European, Asian, or Middle Eastern, but the intimacy is universal.

the State agrees the smoking ban may influence members of the Post Home to disperse and go elsewhere. Br. of Resp't at 15. Moreover, it is reasonable to infer the smoking ban may influence a potential member's choice to join the Post Home.[17] Acknowledging all the parties understand how the smoking ban influences the members and potential members of the Post Home, the difficulty of the majority to see how the smoking ban infringes the right of intimate association is irrelevant to all but the majority and its preferred result.

When the State imposes itself into the decision making process of the members or potential members of the Post Home, the State unduly intrudes into the Post Home's right of intimate association. I would hold the Act invalid as applied. However, the Act is also invalid as a deprivation of substantive due process.

The Act Violates Due Process

All regulations and laws enacted pursuant to the State's police power are subject to the due process clause of the Fourteenth Amendment to the United States Constitution. *See, e.g., Lawton v. Steele*, 152 U.S. 133, 14 S. Ct. 499, 38 L. Ed. 385 (1894); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (stating due process is intended to

[17] In a motion for summary judgment, all facts and reasonable inferences are viewed in a light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

protect the individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective").

To satisfy due process, the law or regulation must (1) be aimed at achieving a legitimate public purpose, (2) use means that are reasonably necessary to achieve that purpose, and (3) not be unduly oppressive on individuals. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594-95, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1962) (citing *Lawton*, 152 U.S at 137). "The classic statement of the rule in *Lawton v. Steele,* 152 U.S. 133, 137 (1894), is still valid today." *Goldblatt*, 369 U.S. at 594; *see also Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 541-42, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005) (observing the *Lawton* due process inquiry asks "whether a regulation of private property is *effective* in achieving some legitimate public purpose[] . . . , for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause.").

Undoubtedly the smoking ban regulates private property. *See* majority at 23. But more fundamentally the smoking ban prohibits private conduct. It is this regulation of private conduct I find most disturbing.

"It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. We have vindicated this principle before." *Planned Parenthood v. Casey*, 505 U.S. 833, 847, 112 S. Ct. 2791,

120 L. Ed. 2d 674 (1992) (plurality opinion).

In *Meyer v. Nebraska*, 262 U.S. 390, 396-97, 43 S. Ct. 625, 67 L. Ed. 1042 (1923), a teacher was tried and convicted of teaching a 10-year-old the German language, contravening a statute that made it verboten to teach German. Reversing the conviction the United States Supreme Court held,

> [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Id. at 399 (citing cases).

Similarly in *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35, 45 S. Ct. 571, 573, 69 L. Ed. 1070 (1925), an Oregon statute required students attend public school only. The Court held Oregon had a legitimate interest to regulate schools, teachers, and curriculum and to require all children of a certain age attend school; however, to compel attendance at public school, the State "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id*. at 534-35.

These cases should not be dismissed as judicial aggression toward governmental overreaching into the familial sphere under the guise of police power. As recently as 2003 the United States Supreme Court recognized the

promise that

> [l]iberty protects the person from unwarranted government intrusions into a dwelling *or other private places*. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self . . . .

Lawrence v. Texas, 539 U.S. 558, 562, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (emphasis added); *see also Roe v. Wade*, 410 U.S. 113, 152-53, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) (banning abortion violates substantive due process). I seriously doubt the State's health interest to protect against sexually transmitted disease, a real and verifiable concern, could constitutionally justify invading the privacy of consenting adults.

This self-autonomy includes what time you go to bed at night, how much to exercise, how much fat to eat, a choice to smoke, a choice to be around smokers as well as every other myriad private decision we make to pursue happiness in our lives (even when some choices are probably not as healthy as others). Yet these choices are the very essence of personal liberty and self-autonomy.[18] Most of us would pause if the State compelled our bedtime based

[18] As articulated by Professor Barnett:

> [T]here is a private domain within which persons may do as they please, provided their conduct does not encroach upon the rightful domain of others. As long as their actions remain within this rightful domain, other persons – including persons calling themselves government officials – should not interfere without

on a perception that many Washingtonians are sleepless in Seattle. Hopefully in our free society the coercive power of the State is restricted from this realm.

> If . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution"

Mugler v. Kansas, 123 U.S. 623, 661, 8 S. Ct. 273, 31 L. Ed. 205 (1887); *see also Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 694, 169 P.3d 14 (2007).

The State imposes its coercive power on the members of the Post Home, not because there are people at the Post Home who do not want to be around smokers, but quite the contrary. Every member of the Post Home would prefer smoking be permitted at the Post Home, including the seven members who are also employees. Rather, the State imposes its coercive power on the Post Home notwithstanding the desire of those locked behind its private doors to prevent outside intrusion.

According to the majority, the Act is premised on the claim that banning smoking in the Post Home is necessary to ensure the health and safety of the

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compelling justification.

Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty 58 (2004).

Post Home's seven member-employees. However, it is inherently a factual question whether the legitimate end of ensuring employees are safe from workplace dangers is advanced by banning workplace smoking. But the State submits no such facts in its affidavit to support such a proposition; it merely cites a widely discredited federal report to support its claim. *See* Thomas A. Lambert, *The Case Against Smoking Bans*, 13 Mo. Envtl. L. & Pol'y Rev. 94, 109-111 (2006).

The focus on secondhand smoke as an alleged workplace danger began in 1993 with the classification by the Environmental Protection Agency (EPA) of secondhand smoke as a Class A carcinogen, supposedly causing an approximate 3,000 deaths of nonsmoking adults per year.[19] Shortly after the EPA released its report, a congressional inquiry found "the Agency has deliberately abused and manipulated the scientific data in order to reach a predetermined, politically motivated result. . . . [The] EPA was able to reach that conclusion only by ignoring or discounting major studies and by deviating from generally accepted scientific standards."[20]

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[19] U.S. Envtl. Prot. Agency, Office of Research & Dev., Office of Health & Envtl. Assessment, Wash., D.C., *Respiratory Health Effects of Passive Smoking (Also Known as Exposure to Secondhand Smoke or Environmental Tobacco Smoke ETS)*, EPA/600/6-90/006F (1992), *available at* http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=2835.

[20] *Environmental Tobacco Smoke: Hearing Before the Subcomm. on Health & the Env't of the Comm. on Energy & Commerce H. Rep.*, 103d Cong. 3 (1993) (statement of Rep. Thomas J. Bliley, Jr., Member, Comm. on Energy &

Courts have also questioned the EPA's conclusion secondhand smoke presents a danger in the workplace. "The court is faced with the ugly possibility that EPA adopted a methodology for each chapter, without explanation, based on the outcome sought in that chapter." *Flue-Cured Tobacco Coop. Stabilization Corp. v. U.S. Envtl. Prot. Agency,* 4 F. Supp. 2d 435, 456 (M.D.N.C. 1998), *vacated on other grounds,* 313 F.3d 852 (4th Cir. 2002). That court, unlike our own, was more concerned with finding the Truth than merely identifying and upholding government policy. The court concluded:

> EPA publicly committed to a conclusion before research had begun; . . . adjusted established procedure and scientific norms to validate the Agency's public conclusion, and aggressively utilized the Act's authority to disseminate findings to establish a de facto regulatory scheme intended to restrict [tobacco] products and to influence public opinion. . . . EPA disregarded information and made findings on selective information; did not disseminate significant epidemiologic information; deviated from its Risk Assessment Guidelines; failed to disclose important findings and reasoning; and left significant questions without answers. . . . While so doing, EPA produced limited evidence, then claimed the weight of the Agency's research evidence demonstrated ETS [environmental tobacco smoke] causes cancer.

Id. at 465-66 (footnote omitted).

Subsequent studies confirm these criticisms to question the supposed connection between cancer and secondhand smoke.[21] A respected study,

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Commerce).

[21] *See* James E. Enstrom & Geoffrey C. Kabat, *Environmental Tobacco Smoke and Tobacco Related Mortality in a Prospective Study of Californians, 1960-*

primarily funded by the American Cancer Society, of more than 35,000 nonsmoking Californians married to smokers concluded, "[t]he results do not support a causal relation between environmental tobacco smoke and tobacco related mortality, although they do not rule out a small effect. The association between exposure to environmental tobacco smoke and coronary heart disease and lung cancer may be considerably weaker than generally believed."[22]

These criticisms of the dangers of secondhand smoke have not gone unnoticed. Smoking ban proponents often answer these criticisms not with contradictory scientific data but with ad hominem attacks on the scientists themselves.[23]

As a famous lawyer once asked, "What is to be done?"[24]

Recall the three-prong test that must be satisfied before the State may

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98, 326 Brit. Med. J. 1057 (2003), *available at* http://bmj.bmjjournals.com/cgi/content/full/326/7398/1057.

[22] *Id.*

[23] *See* James E. Enstrom, *Defending Legitimate Epidemiologic Research: Combating Lysenko Pseudoscience*, 4 Epidemiologic Perspectives & Innovations (Oct. 10, 2007) (defending his findings against antismoking advocates), *available at* http://www.epi-perspectives.com/content/ 4/1/11; Carl V. Phillips, *Warning: Anti-tobacco Activism May Be Hazardous to Epidemiologic Science*, 4 Epidemiologic Perspectives & Innovations (Oct. 22, 2007), *available at* http://www.epi-perspectives.com/content/4/1/13.

[24] Vladimir Lenin's *What Is To Be Done?* (1902) is a political pamphlet whose title was inspired by the homonymous novel written by Nikolai Chernyshevskii and published in 1863. *See* Martin E. Malia, *The Soviet Tragedy: A History of Socialism in Russia, 1917-1991*, 74 (1994).

regulate private property or prohibit private lawful conduct. Under the first prong we ask if there is a legitimate public purpose for the action. The stated purpose of the smoking ban is workplace safety:

> The people of the state of Washington recognize that exposure to second-hand smoke is known to cause cancer in humans. Second-hand smoke is a known cause of other diseases including pneumonia, asthma, bronchitis, and heart disease. Citizens are often exposed to second-hand smoke in the workplace, and are *likely to develop chronic, potentially fatal diseases as a result of such exposure*. In order to protect the health and welfare of all citizens, including workers in their places of employment, it is *necessary* to prohibit smoking in public places and workplaces.

RCW 70.160.011 (emphasis added); *see also* CP at 227 (State's memorandum in support of its motion for summary judgment stating, "challenged laws cannot reasonably be characterized as anything other than police power legislation rationally related to protecting employees from the *known* health risks of second-hand smoke" (emphasis added)).

I agree modern jurisprudence recognizes workplace safety as a legitimate public purpose. *See, e.g., Parrish v. W. Coast Hotel Co.,* 185 Wash. 581, 55 P.2d 1083 (1936) (upholding a statute governing wages and working conditions of female and child laborers), *aff'd,* 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703 (1937). However, "'[w]hen our rulers worry about our health, we should worry about our liberty.'" Joseph Sobran, *The Wanderer* 5 (June 26, 1997), *quoted in Seeley v. State*, 132 Wn.2d 776, 814, 940 P.2d 604 (1997) (Sanders,

J., dissenting).

Under the second prong of the test, we look to the necessity of the action to achieve that legitimate public purpose. Absent a substantial relation to the achievement of the legitimate public purpose, the State may not regulate or prohibit the free conduct of its citizens. *See Biggers*, 162 Wn.2d at 694; *see also Petstel, Inc. v. King County*, 77 Wn.2d 144, 154, 459 P.2d 937 (1969) (stating, "even though the activity in question be subject to police power regulation, the legislation must be substantially related to the evil sought to be cured").

As shown above whether secondhand smoke is the *known* cause of disease is far from self-evident for summary judgment purposes. Dr. Elizabeth Whelan, President of the American Council on Science and Health (and an antismoking advocate) observed, "the role of ETS [environmental tobacco smoke] in the development of chronic diseases like cancer and heart disease is uncertain and controversial."[25]

If there is no proven causal relation between secondhand smoke and workplace dangers, the prohibition of smoking is arbitrary; arbitrary regulations

[25] Elizabeth M. Whelan, Editorial, *Warning: Overstating the Case Against Secondhand Smoke is Unnecessary—and Harmful to Public Health Policy,* Am. Council on Sci. & Health (posted Aug. 1, 2000), *available at* http://www.acsh.org/healthissues/newsID.248/healthissue_detail.asp.

violate due process.[26] *See Lawton*, 152 U.S. at 137 (stating a "legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations."). A mere *possibility* of harm is insufficient. *See State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 50 Wn.2d 378, 384, 312 P.2d 195 (1957). Even slight harm is equally insufficient. *See* Lambert, *supra*, at 111 ("[P]aternalistic regulations aimed solely at reducing risks . . . are justifiable only when the risk is relatively serious and the liberty intrusion occasioned by the regulation is relatively minor."). As succinctly stated by Dr. Michael Siegel, professor in the Social and Behavioral Sciences Department, Boston University School of Public Health and noted antismoking advocate, "The ends do not justify the means, especially when those means are violating principles of autonomy and self-determination that form the essential bases for free societies. These are values which cannot and should not be trodden upon by public health organizations simply to promote a favored policy."[27]

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[26] Regulation of conduct based on questionable science may be politically expedient, but political expediency is no reason to infringe on freedom.

[27] Michael Siegel, *Is the Tobacco Control Movement Misrepresenting the Acute Cardiovascular Health Effects of Secondhand Smoke Exposure? An Analysis of the Scientific Evidence and Commentary on the Implications for Tobacco Control and Public Health Practice,* 4 Epidemiologic Perspectives & Innovations (Oct. 10, 2007), *available at* http://www.epi-

I would hold the Act violates substantive due process absent proof, persuasive to the fact finder, that the stated reason for the Act is actually and substantially advanced by the implementation of the prohibition.[28] This is not to require "undisputed" or "absolute" scientific proof, as the majority interprets, but instead merely to require the declared reason for the Act be actually and substantially advanced. Majority at 32 n.28. Absent this minimal requirement, individuals hold their liberty in trust for the State to extinguish at its leisure.

The Act Violates the Post Home's Equal Protection Guaranty

The majority recognizes the essence of the claimed equal protection violation by observing the Act excludes "'a private enclosed workplace, within a public place,'" but the Act "does not, by its terms, apply to private enclosed workplaces in private places," majority at 14-16 (quoting RCW 70.160.060). Yet the majority fails to address the clear equal protection violation obvious from its observation.[29]

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perspectives.com/content/4/1/12; *see also* Phillips, *supra*, n.23.

[28] Unlike the majority's assertion, the day has yet to pass when the Due Process Clause no longer protects an individual's interest in liberty and self-autonomy. *See Lawrence v. Texas*, 539 U.S. 558, 562, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); *Planned Parenthood,* 505 U.S. 833; *see also County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998) (observing the Due Process Clause protects an individual against "the exercise of power without any reasonable justification in the service of a legitimate governmental objective").

[29] Instead the majority unjustifiably limits review of whether the Act violates the

If the Act distinguishes between private enclosed workplaces in public places and private enclosed workplaces in private places, what is the reason to make this public/private distinction? If none, this public/private distinction is "'wholly irrelevant to achievement of legitimate state objectives.'" *Heiskell*, 129 Wn.2d at 124 (quoting *State v. Shawn P.*, 122 Wn.2d 553, 561, 859 P.2d 1220 (1993)).

Before analyzing the equal protection violation, let us revisit the majority's interpretation of RCW 70.160.060. The majority reasons RCW 70.160.060 permits smoking in a manager's back office. Majority at 16. This may be true, but RCW 70.160.060 is not so narrowly written as to apply only to back offices. RCW 70.160.060 permits smoking "in a private enclosed workplace, within a public place, even though such workplace may be visited by nonsmokers . . . ." "Workplace" is not defined in the statute, but commonly means "a place . . . where work is done."[30] Work is done by employees *or* employers.[31] Moreover, RCW 70.160.060 makes no distinction between an

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Post Home's equal protection rights, elevating form over substance by alleging the argument is not presented. Majority at 39 n.32. Yet a fair reading of the briefs indicates otherwise. Opening Br. of Appellant at 27-28 (arguing, "[b]urdening the property of some 'private facilities' with a smoking ban but not others . . . violates equal protection"); Br. of Resp't at 23-25 (responding to appellant's argument). The majority's myopic view of the arguments presented is curious but ultimately understandable to reach its preferred result.

[30] Webster's, *supra*, at 2635.

employee or nonemployee but permits smoking even though the "workplace" may be visited by "nonsmokers." The only restriction appears to be employees must not be "required to pass through during the course of employment . . . ." RCW 70.160.020(3).[32]

The Act distinguishes between two classes of workplaces, permitting smoking in one workplace, but not another. The majority claims the Act permits smoking in "a private enclosed workplace, within a *public* place," but not in a *private* place. RCW 70.160.060 (emphasis added). I find this distinction perplexing.

"'Under the rational basis test the court must determine: . . . whether there are reasonable grounds to distinguish between those within and those without the class . . . .'" *Griffin v. Eller*, 130 Wn.2d 58, 65, 922 P.2d 788 (1996) (quoting *Convention Ctr. Coal. v. City of Seattle*, 107 Wn.2d 370, 378-79, 730 P.2d 636 (1986)).

The following hypothetical elucidates the equal protection violation. Suppose two taverns have a "private enclosed workplace" adjacent to the

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[31] *See id*. at 743 (defining "employee," "employer," and "employment"); *id.* at 2634 (defining "work").

[32] I wonder if the Act envisions a cause of action for wrongful termination of an employee who refuses to meet her manager in her manager's office because her manager smokes?

primary workplace. This "enclosed workplace" is "private" in the sense that it is completely separated from the primary bar, work is performed there, and it is "intended for or restricted to the use of a particular person or group or class of persons **:** not freely available to the public."[33] Now suppose the first bar is called "Moe's Tavern" and open to anyone, but the second is called "The American Legion Post Home" and only open to members. Smoking can occur at Moe's Tavern in its "private enclosed workplace" but it cannot occur at the American Legion Post Home in its "private enclosed workplace" simply because it is private? I can imagine no reason for this distinction, and I challenge the majority to posit one.

Conclusion

For the reasons stated above, I would hold the Act does not apply to the Post Home as a private facility. Alternatively, if the Post Home's status as a private facility does not limit the Act's application, I would hold the Act is void for vagueness; unduly interferes with the Post Home's right of intimate association; violates the Post Home's substantive due process rights absent actual proof of a real and substantial relation between secondhand smoke and workplace dangers; and violates equal protection by distinguishing between two classes of business without reasonable grounds.

[33] Webster's, *supra*, at 1804.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: